IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 426 of 2002

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KOLI BHIKHA RAMA (DECD.)

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 426 of 2002
   (MR GR SHAIKH) for Petitioner No. 1
   MR RC KAKKAD for Petitioner No. 2-3
   MR HC PATEL ASST GOVERNMENT PLEADER for Respondent No. 1
   RULE SERVED for Respondent No. 1
   RULE UNSERVED for Respondent No. 2-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 27/11/2002

ORAL JUDGEMENT

#. Heard learned advocate Mr.Rajesh Kakkad on behalf of

the petitioners and learned AGP Mr.H.C.Patel appearing on behalf of the respondent No.1. Though notice has been served on the respondent Nos.2 & 3, no appearance has been filed on their behalf and therefore, the matter is taken for final hearing in their absence.

Today, learned AGP Mr.H.C.Patel has placed on record the affidavit-in-reply filed by the Deputy Collector, Porbandar which is taken on record.

#. In the present petition, RULE has been issued by this Court returnable on 30th October, 2002 vide order dated 16th march, 2002 and mean while, the order passed by the Deputy Collector dated 23rd March, 1998 has been stayed and it was directed to both the sides to maintain status quo in respect of the land in question prevailing as on the date of order on 16th March, 2002.

#. The brief facts giving rise to the present petition are as under :-

The petitioners purchased the land bearing Survey No.227 / 1 admeasuring Acre 1, Guntha 28 of the sim of village Ranavav, Taluka Ranavav District Porbandar by registered sale deed dated 24th July, 1989 being Registered No.2638 from its original owners and occupants - viz. Ali Hasam and Usman Hasam - the respondents Nos.2 & 3 herein. Necessary entry to that effect being Entry No.10268 was posted in the Record of rights on 28-1-1990 and the entry has been certified in accordance with law on 22nd February, 1990. Subsequent tot he certification of entry and after about 4 years, the Deputy Collector, Porbandar issued show cause notice under the provisions of the Bombay Prevention of Fragmentation and Consolidation of the Holdings Act, 1947 [hereinafter referred to as `the Act'] calling upon the petitioners to show cause as to why the sale in favour of the petitioners be not cancelled under the provisions of the Act. The Deputy Collector, Porbandar vide Case No.54/92-93 by order dated 23rd March, 1993 held the sale to be invalid and imposed a fine of Rs.200 and ordered for the summary eviction of the petitioners under the provisions of Section 9[3] of the Act. Being aggrieved of the aforesaid order, preferred Revision Application being No.8/93 before the Secretary [Appeals], Revenue Department, State of Gujarat which came to be allowed vide order dated 21st February / March, 1995 allowing the revision and thereby cancelled the order of Deputy Collector and remanded the matter back for deciding the same according to the law and in the light of the order passed by the Secretary [Appeals] which is at Annexure-B.

On being remand, the Deputy Collector, Porbandar vide Case No.9/94-95 by order dated 5th January, 1998 held the sale to be invalid and fined the respondents Nos.2 & 3 with Rs.200/- and ordered for the summary eviction of the petitioners under Section 9[3] of the Act. Thereafter, the petitioners preferred Revision being Revision Application No.1/98 before the Secretary [Appeals], who in turn, vide order dated 8th November/ December, 2000 dismissed the revision application filed by the petitioner challenging the orders passed by the Deputy Collector and the Secretary [Appeals].

#. Learned advocate Mr.Rajesh Kakkad on behalf of the petitioner has submitted that initially the Deputy Collector, Porbandar has passed order on 23rd March, 1993 declaring the sale deed as illegal and contrary to the Act. Against that order, the petitioner has preferred revision before the Secretary [Appeals]. The Secretary [Appeals] has considered the aspect in para-5 and 6 of the judgment to the effect that both the lands Survey No.228/1 and 227 are adjoining lands and the land Survey No.228 is admeasuring 7-15 Acre Guntha. That both the lands are situated in a manner so that the same can be consolidated under the Act but the Deputy Collector has not taken into account the Jirayat standard of two acre of the total area. Even Survey No.227/1, looking to the 7 /12 Forms, therein recorded with regard to agriculture produce. It is also their case that they are utilising the water from the well situated in Survey No.228. The authority has initiated the proceedings beyond period of one year and even this aspect has also not been taken into account by the Deputy Collector and therefore, the revisional authority has set aside the order passed by the Deputy Collector on 23rd March, 1993 and directed to decide afresh in accordance with law as observed by the revisional authority in para-5 and 6 of the said judgment. The said order passed by the revisional authority on 24th February, 1995. Learned advocate Mr.Kakkad has submitted that after remanding the matter back to the Deputy Collector, Porbandar,the Deputy Collector has not examined properly in light of the observations made by the revisional authority and only considering the fact that two different documents have been executed between the parties in respect of the land Survey No.227 / 1 and 228 and the purchasers are different and therefore the object of Fragment Act, has not been observed by the petitioners. The Deputy Collector has also come to the conclusion that under Section 35 for Revision, there is not time limit prescribed to exercise the powers and therefore the authority has rightly initiated the proceedings within

some reasonable time. He also submitted that in reality said transaction is of one family though in two different name of sons. In both the documents, father's name remained common and therefore, the lands remained with one family. Merely shares have been made by the father in order to see that there may not be any dispute between the brothers. However, the object of the law is that the land may not be fragmented by executing the documents and it should have remained consolidated and used accordingly. He relied upon provisions of Section 8-AA of the Act that even partition is permitted so the land may not be fragmented to that extent. There is detailed procedure prescribed under the Act. In short, his submissions is technical approach adopted by the State Authority after a period of more than two years without any valid evidence, which is illegal and arbitrary and contrary to the provisions oft he Act. He also stated that the contentions which have been raised by the petitioners in written statement were not taken into account by the revisional authority and therefore the orders of the lower authorities require to be quashed and set aside.

#. Learned AGP Mr.H.C.Patel on behalf of the respondent - State Authority has submitted that looking tot he facts which are available on record and the same is not disputed between the parties. It is submitted that two pieces of land purchased by the separate purchaser by way of registered documents. Therefore, he submitted that the authority has rightly initiated proceedings within reasonable time. No illegality has been committed by the State Authority while initiating the proceedings against the petitioners. He also submitted that detailed affidavit-in-reply has been filed by the Deputy Collector, Porbandar - Shri Dinesh Patel on 25th January, 2002. He also submitted that there is no time limit fixed under the statutory provisions under Section 35 of the Act which requires that powers to be exercised within some reasonable time limit and therefore, the State Authority has exercised the powers within some reasonable time, for that, no error has been committed by the State Authority. He, however, supported the decision given by the lower authorities. He also relied upon the Affidavit-in-reply filed by the Deputy Collector, Porbandar.

#. I have considered submissions of learned advocates for the parties. The fact remains that Survey No.227/1 and 228 are adjoining land. The land bearing Survey No.227/1 admeasuring 1 Acre and 28 Gunthas, whereas the land Survey No.228 is admeasuring Acre 7 - 11 Gunthas.

On 24th July, 1995 the Talati-cum-Mantri of Ranavav was examined and he deposed before the authority that the land in question of Survey No.227 / 1 admeasuring 1 - 28 acre gunthas is recorded as protected fragment vide Entry No.2329 / 56. The land of both Survey Nos. are adjoining and the documents have been executed in respect of both survey on very day but different documents have been executed wherein the name of the father remained common in both the documents as the brothers are different. Looking to the orders passed by the lower authority, action has been initiated by the authority only on the basis of the fact that two sale deeds executed in favour of the father and different brothers of adjoining land and therefore, the provisions of Act have been violated. But the authority has not taken account the real effect of the said transaction in one family where the father is common and both the documents the brothers are different. However, there is no further valid evidence produced by the Talati-cum-Mantri on record that the land has been cultivated by the different brothers in a fragmented manner and the land remained as it is and utilised by one family. There is nothing on record to show otherwise. The object of the Act to see that no land in any local area shall be transferred, partitioned so as to create fragment. In the present case, the authority shall have to consider that in reality whether by executing two documents in the common name of father and different brothers, in fact, created fragment or not but for that there is no discussion. By executing two different documents of two different survey numbers itself is not sufficient to create a fragment. The authority shall have to consider that on the basis of said documents which have been executed in respect of two different survey numbers, have in fact created a fragment or not and for that some evidence is necessary. The provisions made under Section 8-AA of the Act, where by transfers, decree, successions or otherwise two or more persons are entitled to share in an undivided agricultural land in any local area for which the standard areas have been fixed and the land is to be partitioned amongst them, such partition shall be effected so as not to create a fragment and for that a detailed procedure has been prescribed under sub Section 2 of Section 8-AA. Therefore, even the partition has also been permitted by the Statutory provisions keeping in mind that it may not create a fragment.

#. After perusal of both the orders passed by the lower authorities, there is nothing on record which established that by this transaction, fragment has been created by

the petitioners. Except two sale deeds have been executed by the petitioners in respect of two survey numbers where father remained common in both survey numbers as purchaser having the land in the name of different brothers. Therefore, considering this aspect, according to my opinion, the authority has committed clear error while not examining the matter with the object of the Act to the effect that in fact whether by these two documents executed between the parties created fragment or not. Merely two different purchasers are on the record and that created a fragment between the parties and therefore, according to my opinion, this being a family arrangement made by the father while purchasing the land in the name of two different sons since both the lands are adjoining to each other, which, ultimately remained as it is and therefore there is no other plot or other adverse effect which created fragment has been made by the petitioners. Even it is not the case of the State Authority and therefore, considering this fact, according to my opinion, the lower authorities have committed error not appreciated the fact as per the object of the Act and also not considered the real effect of these two transactions in respect of Survey No.227/1 and 228. Therefore, considering this fact, according to my opinion, the orders passed by the lower authorities dated 5th January, 1998 by the Deputy Collector, Porbandar and the order passed by the Secretary [Appeals], Revenue Department dated 8th November / December, 2000 requires to be quashed and set aside.

#. Learned advocate Mr.Kakkad, at this stage, has cited one decision in case of RATHOD NAYAMATKHAN AHMEDKHAN, DECEASED, THROUGH HIS HEIRS AND LEGAL REPRESENTATIVES, SARDARKHAN NAYAMATKHAN RATHOD & OTHERS VS. M.K.DAS OR HIS SUCCESSOR IN OFFICE OF THE DEPUTY COLLECTOR, DABHOI AND OTHERS. reported in 1998 [2] G.L.H. 459. This Court has considered that if the authority exercised the powers under Section 9 after a long lapse of time, the authority must consider important aspects as observed by this Court in para-5 of the aforesaid judgment. The decision cited squarely applies in the facts and circumstances of the case on hands. The facts of the case cited reflects that one deceased - Nayamatkhan Ahmedkhan Rathod was one of co-owners of the adjacent land in question which was purchased by Nayamatkhan on 8th May, 1970 in his capacity as member of joint family and merely because the land in question was purchased in the name of Nayamatkhan and the adjacent land was shown to be in the revenue record as joint property of the brothers, it did not mean that the lands were owned by different persons. In the present case also, no doubt

the registered sale deeds came to be executed in favour of different brothers or different persons but the reality which transpires is otherwise because prima facie from the record itself and evidence so produced, it found that it was family arrangement of the father who remained common in both the sale deeds as purchasers and the sale deed came to be executed in favour of the different sons. Therefore, this Court has also considered in light of the facts of the reported case the provisions of Section 7 as well as Section 8-AA of the Act. The observations made in para-5, 6 and 7 of the aforesaid decision require to be referred and the same runs as under :-

"5. Having heard the learned Counsel for the parties, this Court is of the view that in such matters, if the authority exercises the powers under Section 9 of the Act after a long lapse of time, the authority must consider the following important aspects :

[1] Whether the purchaser has altered his position by constructing permanent superstructure on the land or by incurring substantial expenditure for developing the land ?

[2] Whether the purchaser was guilty of any fraud or suppression of material facts before the authorities ?

[3] If two view are possible on merits, the authority should not interfere with the transaction, merely because it is possible to take a view for invalidating the transaction in question.

6. In the facts of the instant case while there is no material on the record of the present proceedings to show whether the petitioners had altered their position by constructing any house or by incurring any expenditure for development of the land, no is there any allegation of fraud or suppression of material facts. The material on record does, however, indicate that deceased Nayamatkhan was one of the co-owners of adjacent land bearing Survey No.40. It is the case of the petitioners that the land in question was purchased by Nayamatkhan on 8-5-1970 in his capacity as a member of the joint family and merely because the land in question was purchased i the name of Nayamatkhan and the adjacent land

was shown to be in the revenue record as joint property of the brothers it did not mean that the lands were owned by different persons.

7. Section 7[1] of the Act provides that no person shall transfer any fragment in respect of which a notice has been given under Sub-section [2] of Section 6 except to the owner of a contiguous survey number or recognised sub division of survey number. The question which arises is whether a co-owner will also be covered by this exception. At this stage, it is also required to be noted that by introducing Section 8AA the legislature did contemplate co-ownership of land and, therefore, provided that where two or more persons are entitled to share in any undivided agricultural land and the land has to be partitioned amongst them, no such partition shall be effected so as to create a fragment. However, the legislature did not deny the right to purchase a fragment, which is conferred on the owner of a contiguous survey number to a co-owner of a contiguous survey number. Moreover, purchase of such a fragment by one or more co-owners of a contiguous survey number will be more conducive to achievement of the object of the Act to prevent fragmentation and to achieve consolidation of holdings of agricultural lands."

#. In view of above discussions and considering the facts of the case and the real effect of the transaction, according to my opinion, the transactions in question did not create fragmentation and therefore the said transactions cannot be considered to be contrary to the Act. In above view of the matter, present petition deserves to be allowed and the same is allowed. The impugned orders passed by the lower authorities dated 5th January, 1998 by the Deputy Collector, Porbandar and the order passed by the Secretary [Appeals], Revenue Department dated 8th November / December, 2000 are hereby quashed and set aside.

Rule is made absolute to the aforesaid extent with no order as to costs.

Date : 27-11-2002 [H.K.Rathod, J.]

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